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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

LYNN G. WALCK, On Behalf Of Himself And Representatively On Behalf Of Himself And Others Similarly Situated,

Petitioner,

v.

AMERICAN STOCK EXCHANGE, INC.

and

NEW YORK STOCK EXCHANGE, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Do public investors possess an implied private right of action under §6 of the Securities Exchange Act of 1934, 15 U.S.C. §78f, against securities exchanges?

2. Did the Third Circuit misapply this Court's decision in Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, --U.S.--, 102 S.Ct. 1825 (1982), when it held that no implied private right of action exists under 15 U.S.C. §78f?

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AMERICAN STOCK EXCHANGE, INC.

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NEW YORK STOCK EXCHANGE, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Lynn G. Walck, individually and representatively on behalf of a class composed of others similarly situated, prays that a Writ of Certiorari issue to review the September 1, 1982 Opinion and Judgment of the Court of Appeals for the Third Circuit.

OPINIONS BELOW

The United States District Court for the Eastern District of Pennsylvania granted Respondents' Motion for Judgment on the Pleadings on May 15, 1981. The Order and Memorandum granting judgment on the pleadings are set forth in the separately presented Appendix, as Appendices G and H, pp. A61-A62 and A63-A101, respectively. The District Court granted Respondents' Motion for Judgment on the Pleadings Dismissing the Complaint on December 18, 1981. The Order and Memorandum granting judgment dismissing the complaint are set forth as Appendices E and F, pp. A36 and A37-A60, respectively. The unanimous opinion of a panel of the United States Court of Appeals for the Third Circuit affirming the Orders of the District Court, dated September 1, 1982, as yet unreported, is set forth as Appendix D, pp. A6-A35. The Court of Appeals denied a Petition

for Rehearing In Banc, without opinion. The Order denying the Petition for Rehearing In Banc is set forth as Appendix B, pp. A2-A3.

JURISDICTION

The United States Court of Appeals for the Third Circuit entered judgment affirming the District Court (Appendix C, p. A4) on September 1, 1982. A timely Petition for Rehearing In Banc was filed by Petitioner on September 15, 1982, and was denied by Order (Appendix B, pp. A2-A3) of the Court of Appeals, in banc, dated and entered September 27, 1982. On October 1, 1982, Petitioner filed a Motion to Stay Issuance of Mandate Pending Application to the Supreme Court for Writ of Certiorari. This motion was granted by Court of Appeals, by Order (Appendix A, p. A1) dated October 6, 1982, thereby staying issuance of the mandate until November 3, 1982.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions, 15 U.S.C. §78f, June 6, 1934, C.404, Title I, §6, 48 Stat. 885, and as amended, June 4, 1975, Pub.L. 94-29, §4, 89 Stat. 104, are set out in Appendix I, pp. A102-A129.

STATEMENT OF THE CASE

Petitioner, Lynn G. Walck ("Mr. Walck"), is a former customer of the stock brokerage firm of Edwards & Hanly, a member of the New York Stock Exchange. He brought this action on behalf of nimself and a class of 279 individual investors who purchased the common stock of the Trans-Lux Corporation ("Trans-Lux stock") through Edwards & Hanly from January 1, 1969, through January 16, 1974. Mr. Walck and the class members were induced to liquidate other securities held in their Edwards & Hanly accounts and to advance additional cash to purchase 500,000 shares of Trans-Lux stock (27% of the shares traded) during a period when trading in Trans-Lux was otherwise minimal.

In January 1974, Trans-Lux stock, which had been purchased by Edwards &

Hanly customers at prices up to $46 per share, dropped to a low of $2 per share. Edwards & Hanly commenced the liquidation of certain accounts containing Trans-Lux stock because of the customers' inability to meet margin calls necessitated when the Trans-Lux stock held as collateral declined in value. Since the class had been induced to acquire Trans-Lux stock and, later, to retain it despite the falling price, the class suffered huge financial losses when the price of their Trans-Lux stock fell and their accounts were liquidated.

In 1974, Mr. Walck initiated an action against Edwards & Hanly and others in the Eastern District of Pennsylvania. Walck v. Edwards & Hanly, et al., Civil Action No. 74-664 ("Edwards & Hanly action"). In the course of discovery in that action,

Mr. Walck learned that the New York Stock Exchange, Inc. and American Stock Exchange, Inc. (collectively, the "Exchanges"), were not only aware of the activities complained of in the Edwards & Hanly action, but also participated in, and aided and abetted these activities, thereby contributing to the losses suffered by the class. Mr. Walck commenced this action against the Exchanges on January 13, 1977, pursuant to §22(a) of the Securities Act of 1933, as amended, 15 U.S.C. §77U(A), §27 of the Securities Exchange Act of 1934, as amended, 15 U.S.C. §7899, §§1331 and 1332(a) of Title 28 U.S.C., and the doctrine of pendant jurisdiction. The allegations against the Exchanges were based upon essentially the same facts and circumstances complained of in the Edwards &

Hanly action,[1] but focused on the Exchanges' willful failure to compel compliance by Edwards & Hanly with the Exchanges' own rules and regulations and the applicable federal securities laws.

After certification of the class, the Exchanges filed a series of motions which ultimately resulted in the District Court dismissing the action in its entirety. The United States Court of Appeals for the Third Circuit affirmed the dismissal and denied Mr. Walck's Petition for Rehearing In Banc. Mr. Walck is now seeking a Writ of Certiorari to have this Court review that portion of the decision below that

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1/ In September 1976, Edwards & Hanly filed for relief under Chapter XI of the Bankruptcy Act in the Southern District of New York, No. 76 B 1807-G. As a result, the Edwards & Hanly action was stayed indefinitely.

denied the existence of an implied private right of action under §6 of the Securities Exchange Act of 1934.

REASONS FOR GRANTING THE WRIT

Petitioner respectfully urges this Court to grant the Writ sought for two reasons. First, the Third Circuit decision denying recognition of an implied private right of action under §6 of the 1934 Act, based on the standard enunciated in Cort v. Ash, 422 U.S. 66 (1975), is wholly inconsistent with this Court's decision in Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, -- U.S.--, 102 S.Ct. 1825 (1982). Second, the issue presented is one of exceptional importance on which the United States Circuit Courts of Appeal are divided.

I. The Third Circuit Erroneously Decided This Case Under Cort v. Ash Rather Than Curran And In Its Discussion Of Curran Misinterpreted The Standard Enunciated By This Court.

In deciding this matter under Cort v. Ash, rather than Curran, the Third Circuit held that since all of the events underlying the action occurred prior to passage of the 1975 amendments to the 1934 Act ("1975 Amendments"), the relevant inquiry was whether Congress intended to create a remedy in 1934, not whether it intended to preserve a remedy in 1975.

After rejecting Curran, the court went on to state that even if Curran were applicable, Mr. Walck's claim would still fail for two reasons. First, since the federal courts had not routinely and consistently recognized an implied private cause of action under §6, the case lacked the factual predicate necessary to sustain an implied cause of action under the

Curran standard. Opinion, at pp. 17-18. Second, the court stressed that tne legislative history surrounding tne 1975 Amendments "did not contain any affirmative indication that Congress was even aware of -- much less intended to preserve --" an implied remedy. Opinion, at p. 19.

Each of these holdings and statements is inconsistent with this Court's decision in Curran. Curran, not Cort v. Ash, should have governed the outcome on this case and, properly applied, should have resulted in the recognition of an implied private remedy under §6 of tne 1934 Act.

A. Curran Not Cort v. Ash Should Have Provided The Basis For Review.

In applying Cort v. Ash, rather than Curran, the Third Circuit emphasized that the events underlying Mr. Walck's

action all occurred prior to the passage of the 1975 Amendments. While this is true, it is totally irrelevant and fails to consider that Curran arose and was decided under identical circumstances.

In Curran, this Court actually had before it four separate cases. The Curran case itself (No. 80-203) involved events which occurred in 1973, before passage of the 1974 amendments to the Commodity Exchange Act, 7 U.S.C. §§1, et seq. Thus, both the Curran case and the present case involve situations where a court should consider the effect of a subsequent amendment to determine the state of the law immediately prior to passage of that amendment.

In Curran, this Court recognized that if Congress preserved a cause of action in 1974 when it amended the Commodity Exchange Act, that cause of action

must necessarily have existed the year before the amendments were passed. The Third Circuit, however, reached the exact opposite conclusion and held that its duty was limited to determining Congress' intent in 1934. The Third Circuit's approach was directly contrary to this Court's approach in Curran.

B. Prior To The 1975 Amendments To The 1934 Act, The Relevant Case Law Uniformly And Consistently Recognized The Existence Of An Implied Private Right of Action Under §6.

After rejecting the applicability of Curran, the Third Circuit went on to state that even if Curran were considered relevant, the absence of pre-amendment cases recognizing the existence of an implied private remedy under §6 made it impossible to conclude that the federal courts had routinely and consistently recognized an implied private cause of action under §6. The court then stated

that such a finding was required before Curran could be applied to sustain the continued validity of that cause of action after the 1975 Amendments. In its opinion, the court cited Baird v. Franklin, 141 F.2d 238 (2d Cir.), cert. denied, 323 U.S. 737 (1944), and Pettit v. American Stock Exchange, 217 F.Supp. 21 (S.D.N.Y. 1963), as the only cases which recognized an implied private right of action under §6 before the passage of the 1975 Amendments.

Here too, the Third Circuit erred. Its conclusions on the extent and import of the relevant case law were based in part on a misreading of Curran and in part on a failure to consider numerous other cases which supported the existence of an implied private right of action.

In determining that "the factual predicate necessary for the application of

the Curran preservation theory was absent," the Third Circuit stated:

> ...it would be inappropriate for us to say, as the Supreme Court said in Curran, that before 1975 "the consensus of opinion concerning the existence of a private cause of action under §6 was equally as uniform and well understood" as that concerning §10(b) and Rule 10b-5 (citation omitted).

Opinion at pp. 18-19. However, this is not the standard that this Court established in Curran. This Court actually said:

> Although the consensus of opinion concerning the existence of a private cause of action under the CEA was neither as old nor as overwhelming as the consensus concerning §10(b), it was equally uniform and well understood. This Court, as did other federal courts and federal practitioners, simply assumed that the remedy was available.

Curran, supra, 102 S.Ct. at 1840. In the many cases which arose under the pre-1975 Amendments version of §6, it had been uniformly decided and was well understood that public investors had a implied private

right of action against securities exchanges under §6.[2/] Given the absence of dispute

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2/ In the Second Circuit: Baird v. Franklin, 141 F.2d 238 (Clark, J., concurring in part), cert. denied, 323 U.S. 737 (1944); Rich v. New York Stock Exchange, 522 F.2d 153 (1975); Kroese v. New York Stock Exchange, 227 F.Supp. 519 (S.D.N.Y. 1964); Pettit v. American Stock Exchange, 217 F.Supp. 21 (S.D.N.Y. 1963); Weinberger v. New York Stock Exchange, 335 F.Supp. 139 (S.D.N.Y. 1971); Marbury Management, Inc. v. Alfred Kohn, Wood, Walker & Co., 373 F.Supp. 140 (S.D.N.Y. 1974); New York Stock Exchange, Inc. v. Sloan, 394 F.Supp. 1303 (S.D.N.Y. 1975); Weinberger v. New York Stock Exchange, 403 F.Supp. 1020 (S.D.N.Y. 1975); Phillips v. American Stock Exchange, [1974-75 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶95,035 (S.D.N.Y. 1975).

In the Third Circuit: Collins v. PBW Stock Exchange, Inc., 408 F.Supp. 1344 (E.D.Pa. 1976); Bright v. Philadelphia-Baltimore-Washington Stock Exchange, 327 F.Supp. 495 (E.D.Pa. 1971).

In the Fifth Circuit: Caddell v. Goodbody & Co., [1973 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶93,938 (N.D. Ala. 1972).

[Footnote 2 continued on next page]

concerning the existence of an implied private right of action prior to 1975, it is clear that an implied cause of action under §6 "was part of the contemporary legal context" (Curran, supra, 102 S.Ct. at 1841) which confronted Congress in 1975.

The Third Circuit's error was that it totally ignored the cases cited in footnote 2 in wnich the federal courts assumed, based on existing precedent, that an implied private right of action existed

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[Footnote 2 continued]

In the Seventh Circuit: Hochfelder v. Midwest Stock Exchange, 503 F.2d 364, cert. denied, 419 U.S. 875 (1974); see also Butterman v. Walston & Co., 387 F.2d 822 (1967), cert. denied, 391 U.S. 913 (1968).

In the Ninth Circuit: Hughes v. Dempsey-Tegeler & Co., Inc., 534 F.2d 156, cert. denied, 429 U.S. 896 (1976); Carr v. New York Stock Exchange, Inc., 414 F.Supp. 1292 (N.D. Cal. 1976).

under §6. Commodity Act cases in which a similar assumption was made were, of course, considered by this Court in Curran. Curran, supra 102 S.Ct. at 1840.

Had the scope of the Third Circuit's inquiry into the relevant cases been as broad as this Court's in Curran, the only possible result would have been a conclusion that there was a uniform and well understood consensus in favor of the §6 remedy at the time the 1975 Amendments were passed. Thus, the necessary factual predicate for application of Curran was, contrary to the Third Circuit's statement, present in the case at bar.

C. The Third Circuit Erred In Searching For Affirmative Indications That Congress Intended To Preserve The §6 Remedy.

The Third Circuit's third ground for rejecting Curran was the absence of any legislative history relevant to the 1975

Amendments that indicated that Congress intended to preserve the remedy. This focus was improper; the court should have concerned itself instead with indications that Congress intended to abolish the long-recognized existing remedy.

The Third Circuit's error was that it completely ignored the maxim of statutory construction this Court relied upon in Curran, at 1841, n.66:

> Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change, [citations omitted]. So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.

citing, Lorillard v. Pons, 434 U.S. 575, 580-581 (1978). This Court has frequently made reference to Congress' presumed awareness of the judicial interpretation of the

law in determining Congressional intent. In Cannon v. University of Chicago, 441 U.S. 677, 698-699 (1979), where this Court found an implied private right of action under Title IX of the Education Amendments of 1972, it stated:

> [I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts and that it expected its enactment to be interpreted in conformity with them.

Similarly, in Albernaz v. United States, 450 U.S. 333, 341-342 (1981), which involved Congressional intent concerning sentencing under two criminal conspiracy statutes, this Court stated:

> ... Congress is "predominantly a lawyer's body", [citation omitted] and it is appropriate for us "to assume that our elected representatives know the law." [citation omitted]. As a result, if anything is to be assumed from the congressional silence on this point, it is that Congress was aware of the [pertinent preceding

> judicial interpretation] and legislated with it in mind. It is not a function of this Court to presume that "Congress was unaware of what it accomplished. ..." [citation omitted; emphasis added].

If the Third Circuit followed the approach mandated by this Court, it would have searched the legislative record for indications that Congress intended to abolish the existing remedy, not for affirmative indications that Congress intended to preserve the remedy. Had the proper inquiry been conducted, tne court would not have found anything to indicate that Congress intended to abolish the long-recognized implied private remedy under §6 and would have concluded that the remedy had been preserved.

Because of the analytical errors commited by the Third Circuit, it is respectfully urged that this Court grant the Writ sought and consider Mr. Walck's and

the class's claim under the standard enunciated in Curran.

II. The Question Raised By This Case Is One Of Exceptional Importance On Which The Circuits Are Divided.

The precedent below permits securities exchanges to operate knowing that their conduct, no matter how insensitive to the needs of public investors, or violative of the concept of self-regulation, will not be scrutinized by the federal courts at the behest of public investors.

The Third Circuit states that "there can be no doubt that §6 was enacted for the 'especial benefit' of investors." Opinion at p. 10. (emphasis and quotes in original). Despite this recognition, the Third Circuit ignored language contained in Curran, which speaks in favor of implication of the private remedy under such circumstances:

> The Court consistently has found that Congress intended to create a cause of action 'where the language of the statute explicitly confers a right directly on a class of persons that includes the plaintiff in the case.'

Curran, at 1845 n.91.

Congress did not intend to give exchanges license to ignore their rules to the detriment of those whom the exchanges are bound to protect. Precisely because Congress "specifically declined to enact a comprehensive regulatory code or to authorize detailed governmental oversight of the workings of the exchanges" (Opinion, at p. 14), the need for recognition of an implied private right of action under §6 of the 1934 Act is greater than was the need for recognition of a similar right under the Commodity Exchange Act. As this Court stated in Cannon v. University of Chicago, supra, at 690 n.13:

> Not suprisingly, the right - or duty - creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action. With the exception of one case, in which the relevant statute reflected a special policy against judicial interference, this Court has never refused to imply a cause of action where the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff in the case.

Without recognition of a remedy under §6, investors have little recourse against an exchange which elects to ignore their rights, even though Congress intended those rights to be paramount. Implication of a remedy is a necessity if exchanges are to fullfil the role Congress delegated to them.

In addition to the issue's intrinsic importance, it is also one on which the Circuits are split, both as to the existence of a remedy and even as to which of this Court's precedents now controls the issue. The Second Circuit has always

recognized the remedy, beginning with Baird v. Franklin, supra, where it was stated at 141 F.2d at 245 (J. Clark, concurring in part):

> It is well established that members of a class for whose protection a statutory duty is created may sue for injuries resulting from its breach ... .

This standard was recently recited by the Second Circuit in Lank v. New York Stock Exchange, 548 F.2d 61, 65 (1977) where the court added:

> This long established rule is: that before a private right of action may be inferred the would-be plaintiff must show that he is within the class the statute is intended to protect, and that it is not sufficient merely to show that the defendant is within the class the statute is designed to regulate. This rule has been recently reaffirmed by the Supreme Court. See, e.g., Cort v. Ash, 422 U.S. 66, 78, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975).

It then concluded at 66, that it "was the intention of Congress to draw a clear line

of demarcation between public investors ... who may assert claims against a stock exchange for damages arising out of violations of Section 6, and ... members of those exchanges, who may not". However, Rich v. New York Stock Exchange, Inc., 509 F.Supp. 87, 89 (S.D.N.Y. 1981), a district court case arising out of the Second Circuit, while agreeing that the public investor can sue an exchange, seemed to foresee the holding in Curran:

> Where there is a long history of a well-settled, universally accepted implication of an unstated cause of action ... the Cort test is at least modified, and perhaps overriden by considerations for those long-standing traditions.

The Ninth Circuit, in Hughes v. Dempsey-Tegeler & Co., Inc., 534 F.2d 156, cert. denied, 429 U.S. 896 (1976) found it:

> ... well established that Section 6 does impose a duty upon an exchange to enforce the rules adopted pursuant to Section 6 and that a private right of action

> will lie to seek damages for injuries suffered as a result of an exchange's violation of that duty.

Further, it recognized two theories on which §6 cases had been based: a tort theory, suggested in Baird v. Franklin, supra, and breach of an agreement in which the investor is a third-party beneficiary, under the rationale of Weinberger v. New York Stock Exchange, 335 F.Supp. 139 (S.D.N.Y. 1971). Acknowledging that Cort v. Ash had been decided, the court stated that there was "no reason to conclude that the factors enuciated in [Cort v. Ash] mandate a reversal of the longstanding rule that a private right of action is available under Section 6." 534 F.2d at 166 n.5.

In the Fifth Circuit, a district court case, Caddell v. Goodbody & Co., [1973 Transfer Binder] Fed. Sec.L.Rep. (CCH) ¶93,938 (N.D. Ala. 1972), acknowledged the

§6 private right of action as to public customers only, under the Baird v. Franklin rationale. Similarly the Seventh Circuit, in Hochfelder v. Midwest Stock Exchange, 503 F.2d 364, cert. denied, 419 U.S. 875 (1974), assumed liability of an exchange under §6, where the exchanges had, or should have had, knowledge of tne violation. 503 F.2d at 368 n.2.

In contrast to these decisions, the Third Circuit, wrongfully applied the Cort v. Ash test to defeat the rights of public investors, and district courts in the circuit have similarly misapplied Cort v. Ash and its progeny. E.g., Lenowitz v. Philadelphia Stock Exchange, 502 F.Supp. 428 (E.D.Pa. 1980); Pittsburgh Terminal Corp. v. Baltimore & Ohio Railroad Co., 509 F.Supp. 1002 (W.D.Pa. 1981).

In Curran, this Court stated that "(i)t is just as much 'judicial legislation' for

a court to withdraw a remedy which Congress expected to be continued as to improvise one that Congress never had in mind." 102 S.Ct. at 1847 n.100. The Third Circuit violated the dictates of this Court not to be involved in judicial legislation, by overturning a right that had existed for over 36 years.

Conclusion

For the reasons set forth above, it is respectfully submitted that this Petition For A Writ Of Certiorari should be granted to review the opinion and judgment of the United States Court of Appeals for the Third Circuit. In the alternative, it is requested that this Court grant the Petition For Writ Of Certiorari, and remand this cause to the United States Court of Appeals for the Third Circuit, with directions to reconsider its holding in

this cause, in light of this Court's decision in Curran.

Respectfully submitted,

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